Supreme Court, U. S.
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No. 78-652

In the Supreme Court of the United States

OCTOBER TERM, 1978

DAVID B. PEAT, PETITIONER

v.

NATIONAL TRANSPORTATION SAFETY BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner is an airline pilot whose license has been suspended for 60 days for violating Federal Aviation Regulation 91.9, 14 C.F.R. 91.9, which states that: "No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another." The National Transportation Safety Board affirmed the suspension order of the Federal Aviation Administration. Both found that petitioner refused to adhere to clearance instructions of an air traffic controller and instead engaged the controller "in a steady conversation which had the effect of monopolizing the frequency and thus precluding the controller from giving an appropriate degree of attention to other aircraft under his control" (Pet. App. A-9). The court of appeals affirmed (Pet. App. A-1).

Petitioner does not dispute the Board's finding that the radio communications were unnecessary and careless, and that they could have endangered the lives of others by

diverting the attention of the air traffic controller (Pet. App. A-4 to A-9). The Board's determination that such careless conduct is a form of the careless operation prohibited by Section 91.9 is entitled to great weight in construing the regulations. *United States* v. *Larionoff*, 431 U.S. 864, 872-873 (1977); *FTC* v. *Mandel Bros.*, 359 U.S. 385, 391 (1959).

Petitioner's contention is that the regulation did not give him adequate notice that his careless communications were prohibited. Petitioner does not contend, however, that the regulation has ever been interpreted so as to permit such careless radio communications. In the absence of any such contention, the plain language of the regulation comprehends the behavior of petitioner and gave him more than adequate notice of the proscribed activity.[1]

[1]The cases on which petitioner relies for a contrary proposition involve criminal statutes, which must be clearly written to give adequate notice. Regulations in civil cases may be upheld even when they are not as precise as would be necessary to support the imposition of criminal sanctions. *CSC* v. *Letter Carriers*, 413 U.S. 548, 568-581 (1973). But because, even in criminal cases, vagueness challenges must be examined in the light of the facts of the case at hand (see *United States* v. *Powell*, 423 U.S. 87, 92 (1975)), the application of the regulation at issue here is constitutional under the standard used in civil cases.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.[2]

WADE H. MCCREE, JR.
Solicitor General

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[2]Petitioner's second contention (Pet. 6-7)—that there is no evidence to support the finding that his conduct was "operation of an aircraft" within the meaning of Section 91.9—is based on petitioner's premise that the regulation cannot comprehend careless monopolization of the radio frequency. Because petitioner's premise fails, there is more than an adequate factual record to support the Board's determination that petitioner's conduct was proscribed.

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